



Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present, and the future

Shuai Guo

To cite this article: Shuai Guo (2022) Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present, and the future, *Asia Pacific Law Review*, 30:1, 70-92, DOI: [10.1080/10192557.2022.2045707](https://doi.org/10.1080/10192557.2022.2045707)

To link to this article: <https://doi.org/10.1080/10192557.2022.2045707>



Published online: 10 Mar 2022.



Submit your article to this journal [↗](#)



Article views: 52



View related articles [↗](#)



View Crossmark data [↗](#)



Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present, and the future

Shuai Guo 

School of International Law, China University of Political Science and Law, Beijing, People's Republic of China

ABSTRACT

This article examines the new Chinese Mainland–Hong Kong cross-border insolvency cooperation arrangement. The new Record of Meeting reached in May 2021 between the Supreme People's Court of the People's Republic of China and the Government of the Hong Kong Special Administrative Region marks a significant step towards mutual recognition in cross-border insolvency cases, laying down the bedrock for future cooperation. Yet, the new arrangement is still a rough draft, without considering detailed issues. This article provides a comprehensive evaluation of the feasibility of the new arrangement, taking into account previous international insolvency cases in both the Mainland and Hong Kong. In particular, this article proposes that the current arrangement needs further revision and enhanced cooperation, following the model of the European Insolvency Regulation.

KEYWORDS

Cross-border insolvency; Chinese Mainland; Hong Kong; Record of Meeting; Cooperation

I. Introduction

The expansion of global trade and business resulted in an increasing number of international corporations, as well as complexities of international insolvencies.¹ The core issue remains as to whether insolvency proceedings have extraterritorial effects, leading to the distinction of 'universalism' and 'territorialism' doctrines.² At the international level, the United Nations Commission on International Trade Law ('UNCITRAL') has been endeavouring to promote efficient global insolvencies, and it published the Model Law on Cross-border Insolvency ('MLCBI') in 1997, which is now adopted by 54 jurisdictions in 50 States.³ Another significant instrument is the European Insolvency Regulation ('EIR') which directly applies to the European Member States except for

CONTACT Shuai Guo  s.guo@cupl.edu.cn

¹See UNCITRAL, 'Cross-Border Insolvency: Report on UNCITRAL – INSOL Colloquium on Cross-Border Insolvency' (A/CN.9/398, 1994); UNCITRAL, 'Cross-Border Insolvency: Report on UNCITRAL – INSOL Judicial Colloquium on Cross-Border Insolvency' (A/CN.9/413, 1996). See also, e.g. Jay Westbrook, 'Global Insolvencies in a World of Nation States' in Alison Clarke (ed) *Current Issues in Insolvency* (Stevens & Sons, 1991); Jay Westbrook, 'A Global Solution to Multinational Default' (2000) 98 *Michigan Law Review* 2276; Daniel Cunningham and Thomas Werlen, 'Cross-Border Insolvencies in Search of a Global Remedy' (1996) 15 *International Financial Law Review* 51.

²See, e.g. Bob Wessels, *International Insolvency Law Part I: Global Perspectives on Cross-Border Insolvency Law* (4th edn, Kluwer, 2015) para 10013 et seq; Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia, 2017) 26.

³See UNCITRAL, 'Status' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 8 February 2022. Other two relevant instruments are the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments ('MLJ') and UNCITRAL Model Law on Enterprise Group Insolvencies ('MLEG').

Denmark.⁴ Both instruments, with modifications to universalism and territorialism doctrines, take the ‘modified universalism’ approach.⁵ Simply put, a jurisdiction in which a debtor’s centre of main interest (‘COMI’) is located can open main insolvency proceedings that have universal effects across the globe, whereas a jurisdiction in which a debtor’s establishment is located can open secondary/nonmain proceedings that only have territorial effects.⁶

The mainland part (‘Chinese Mainland’ or ‘the Mainland’) of the People’s Republic of China (‘PRC’) and the Hong Kong Special Administrative Region (‘HKSAR’ or ‘HK’) have been experiencing rapid growth of international corporations.⁷ These two jurisdictions are under the so-called one country, two systems regime where they are within the same sovereign state – PRC – but maintain different social and legal systems.⁸ Business between the two should obey laws and regulations in both jurisdictions, and there have been several judicial assistance arrangements between them.⁹ However, there was no special insolvency cooperation arrangement, and the practices in both jurisdictions were fragmented as neither of them adopts the MLCBI.¹⁰

For the purpose of ‘facilitat[ing] the rescue of financially troubled businesses, and provides better protection of the assets of the debtor company as well as the interests of the creditors’ with a further goal of ‘promot[ing] an orderly and efficient insolvency regime’, the Supreme People’s Court (‘SPC’) of Mainland China and the Government of the HKSAR reached a *Record of Meeting on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region* (‘Record of Meeting’) on 14 May 2021.¹¹ In addition, the SPC issued the *Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region* (‘Opinion’), designating three cities – Shanghai, Xiamen, and Shenzhen – as the pilot areas, where the intermediate courts in these cities are empowered to take forward pilot measures on recognition and of assistance to Hong Kong insolvency

⁴Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1 (‘EIR 2000’); Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L141/19 (‘EIR 2015’). EIR 2000 is repealed by EIR 2015 and no longer in force.

⁵See, e.g. Ian F Fletcher, *Insolvency in Private International Law* (OUP, 2005) 15; Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP, 2018).

⁶See below Section IV.A.1.

⁷Yanli Si, Xinmeng Zhang, and Kun Liu, ‘Understanding and Application of the Trial Opinion’ (《试点意见》的理解和适用) (*Shenzhen Bankruptcy Court*, 14 May 2021) <<https://mp.weixin.qq.com/s/8YHCoxljdHjt1ulhgnTq3g>> accessed 8 February 2022.

⁸Teresa Yeuk-wah Cheng, ‘Speech at the Cross-Border Insolvency Cooperation Forum’ (香港律政司郑若骅司长在跨境破产合作论坛的致辞) (*Shenzhen Bankruptcy Court*, 14 May 2021) <<https://mp.weixin.qq.com/s/d8iUYc28MP2DS8OcNmMsdQ>> accessed 8 February 2022. See also Xinyi Gong, *A Balanced Way for China’s Inter-Regional Cross-Border Insolvency Cooperation* (PhD, Leiden University 2016).

⁹Susan Finder, ‘Coming Attractions on The Supreme People’s Court’s Foreign-Related Commercial & Maritime Law Agenda’ (*Supreme People’s Court Monitor*, 10 October 2021) <<https://supremepeoplescourtmonitor.com/2021/10/24/coming-attractions-on-the-supreme-peoples-courts-foreign-related-commercial-maritime-law-agenda/>> accessed 8 February 2022.

¹⁰See, e.g. Emily Lee, ‘Comparing Hong Kong and Chinese Insolvency Laws and Their Cross-Border Complexities’ (2014) 9 J Comp L 259; Meng Seng Wee, ‘A Major Step in Developing Mainland China’s Cross-Border Insolvency Law’ (2021) 30 International Insolvency Review 1.

¹¹The Government of the Hong Kong Special Administrative Region, ‘HKSAR and Mainland sign record of meeting concerning mutual recognition of and assistance to insolvency proceedings (with photos)’ (14 May 2021) <www.info.gov.hk/gia/general/202105/14/P2021051400219.htm> accessed 8 February 2022.

proceedings.¹² On the Hong Kong side, the government issued *Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance Practical Guide* ('Practical Guide') as a reference guide for Mainland administrators to file an application to the Court of First Instance of the High Court of the HKSAR.¹³ It is a long-awaited cooperation arrangement between the Mainland and Hong Kong on cross-border insolvency.¹⁴ It is clarified that the Record of Meeting and associated documents are not formal laws promulgated by legislative bodies. Theoretically, they are just policy documents and do not have binding effects. However, in practice such arrangement is a common tool used by judicial bodies in China, and courts usually follow these documents as semi-'hard laws'.¹⁵

This article examines the new Record of Meeting with a view to improving the cross-border insolvency regime between the Mainland and Hong Kong. Based on the illustration of previous cases between the Mainland and Hong Kong, this article assesses the function of the new arrangement and proposes that additional reform is still needed. Sections II and III describe and evaluate the present Mainland and Hong Kong cross-border insolvency laws and previous judicial practices. Section IV focuses on the new cooperation arrangement, with a comparison with international models, i.e. the MLCBI and the EIR. This section also investigates how the future Mainland–Hong Kong cross-border insolvency arrangement should be amended and proposes that reforms should follow the EIR model. Chapter V Concludes.

II. Recognition of Hong Kong insolvency proceedings in the mainland

A. Mainland insolvency law framework

The current Chinese insolvency legal system is mainly governed by the Chinese Enterprise Bankruptcy Law (EBL). In 1986, a first trial version of the EBL was promulgated during the economic transition period, but it only applied to state-owned enterprises and missed many details in the modern insolvency legal regime.¹⁶ The 1986 EBL was repealed by the 2006 EBL, which came into effect in 2007 and has not been amended since then.¹⁷ The present EBL provides for three types of corporate insolvency procedures:

¹²The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region' (14 May 2021) <www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_opinion_en_tc.pdf> accessed 8 February 2022.

¹³'Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance Practical Guide' (14 May 2021) <www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_practical_guide_en.pdf> accessed 8 February 2022.

¹⁴See, e.g. Weiguo Wang, 'Several Thoughts on the Construction of the Mainland-Hong Kong Cross-Border Insolvency Regime' (关于内地与香港跨境破产机制建设的几点思考) (*China Liquidation*, 18 May 2021) <<http://m.chinaqingsuan.com/news/detail/85659>> accessed 8 February 2022; Shuai Guo, 'A Historic Milestone for Mainland China-Hong Kong Cross-border Insolvency' (*Leiden Law Blog*, 25 May 2021) <www.leidenlawblog.nl/articles/a-historic-milestone-for-mainland-china-hong-kong-cross-border-insolvency> accessed 8 February 2022; Shuai Guo and Bob Wessels, 'Cross-Border Insolvency Between Mainland China and Hong Kong: A First Glance from a Global Perspective' (2021) 18 *International Corporate Rescue* 247.

¹⁵Susan Finder, 'Soft and Hard Law Arrangements and Other Agreements Between the Mainland Authorities and the SAR Governments' (*Supreme People's Court Monitor*, 22 April 2021) <<https://supremepeoplescourtmonitor.com/2021/04/22/soft-and-hard-law-arrangements-other-agreements-between-the-mainland-authorities-and-the-sar-governments/>> accessed 8 February 2022.

¹⁶The Enterprise Bankruptcy Law of the People's Republic of China (On Trial) (《中华人民共和国企业破产法（试行）》) was first promulgated on 2 December 1986 and came into force on 1 November 1988.

¹⁷The Enterprise Bankruptcy Law of the People's Republic of China (《中华人民共和国企业破产法》) was promulgated on 27 August 2006 and came into force on 1 June 2007. See, e.g. Charles Booth, 'The 2006 PRC Enterprise Bankruptcy Law: The Wait if Finally Over' (2006) 20 *Singapore Academy of Law Journal* 275.

reorganization, composition and liquidation. Reorganization gives a debtor breathing time with the aim to rescue business.¹⁸ Usually, an administrator shall be appointed to take over a debtor's assets and manage its business.¹⁹ A debtor-in-possession is also possible but under the supervision of an administrator.²⁰ A reorganization plan should be proposed by administrators or debtors-in-possession,²¹ subject to the approval of creditors.²² By comparison, in a composition, a composition plan should be proposed by a debtor and be approved by creditors.²³ Liquidation is the last resort for companies that cannot resume to normal business through corporate rescue, and administrators are supposed to propose asset distribution plans for creditors' approval.²⁴

There is no specific individual insolvency law in China. However, after the first personal insolvency trial conducted in Wenzhou, Zhejiang,²⁵ an eastern province with quite a few small and medium enterprises (SMEs), Chinese legislators began considering enacting personal bankruptcy laws. Most recently, the first personal bankruptcy regulation in Mainland China was promulgated by the People's Congress of Shenzhen.²⁶ On 16 July 2021, the Shenzhen Bankruptcy Court made the ruling on the first personal reorganization case.²⁷

At the moment, reforming the EBL has been on the agenda of the Chinese legislative body – the National People's Congress (NPC).²⁸ Cross-border issues are among the topics that have drawn much attention from both academics and legislators.²⁹ However, there has not yet been any concrete progress in this area.

B. Mainland international insolvency law

1. Recognition of foreign judgments

Chinese Mainland does not adopt the MLCBI. The only article on cross-border insolvency was added in the 2006 EBL.³⁰ This Article 5 provides that a Chinese court can recognize a

¹⁸EBL, ch 8, Arts 70–94. See Zinian Zhang, *Corporate Reorganisation in China – An Empirical Analysis* (Cambridge University Press, 2018).

¹⁹EBL, ch 3, Arts 22–29.

²⁰EBL, Art 73.

²¹EBL, Arts 79–80.

²²EBL, Art 84.

²³EBL, ch 9, Arts 95–106.

²⁴EBL, ch 10, Arts 107–24.

²⁵Shuai Guo, 'The First Bankruptcy Case in China' (*Leiden Law Blog*, 18 October 2019) <www.leidenlawblog.nl/articles/first-personal-bankruptcy-case-in-china> accessed 8 February 2022.

²⁶The Personal Bankruptcy Regulation of Shenzhen Special Economic Zone was promulgated on 31 August 2020 and came into effect on 1 March 2021. Pingyao Xie, 'Chinese Personal Bankruptcy Regulation: The Shenzhen Experience' (2021) 30 *International Insolvency Review* 410.

²⁷*Re Wenjing Liang* [2021] Yue 03 Po No 230 (Ge 1) Zhi Er.

²⁸'NPC 2021 Legislative Plan' <www.npc.gov.cn/npc/c30834/202104/1968af4c85c246069ef3e8ab36f58d0c.shtml> accessed 8 February 2022.

²⁹See, e.g. Yuanyuan Huang, *The Research on Recognition and Relief Regimes in Cross-Border Insolvency Law* (跨界破产承认与救济制度研究) (University of International Business and Economics Press, 2020); Roman Tomasic, 'Insolvency Law and Debt on the Silk Road: A New Frontier for Cross-border Insolvency?' (2020) 28 *Asian Pacific Law Review* 47; Ling Zhang, 'the Legislative Reform of China's Cross-Border Insolvency Law: Objectives, Framework and Rules' (我国跨境破产法立法的完善: 目标、框架与规则) (2021) 48 *Journal of Minzu University in China* 150.

³⁰EBL, Art 5. See, e.g. Qingxiu Bu, 'China's Enterprise Bankruptcy Law (EBL 2006): Cross-Border Perspectives' (2009) 18 *International Insolvency Review* 187; Guangjian Tu and Xiaolin Li, 'The Chinese Approach Toward Cross-Border Bankruptcy Proceedings: One Progressive Step Ahead' (2015) 24 *International Insolvency Review* 57; Rebecca Parry and Nan Gao, 'The Future Direction of China's Cross-border Insolvency Laws, Related Issues and Potential Problems' (2018) 27 *International Insolvency Review* 5; Shuai Guo, 'Conceptualising Upcoming Chinese Bank Insolvency Law: Cross-Border Issues' (2019) 28 *International Insolvency Review* 44, 49–51.

foreign insolvency judgment, on the condition that (i) the rendering jurisdiction has an international agreement with Mainland China; or (ii) there exists reciprocity between the rendering jurisdiction and Mainland China, subject to the conditions that (a) recognition would not violate the basic principles of Chinese law; (b) recognition would not jeopardize the State's sovereignty, security, or public interest, and (c) recognition would not undermine the interests of Chinese creditors. This provision is akin to the requirements prescribed in the Chinese Civil Procedure Law (CPL).³¹ Hence, recognition of foreign insolvency judgments follows the general principles of private international law, where recognition is limited to foreign judgments but not extended to ongoing proceedings.³²

In the 2000 *B&T* case, a court recognized a foreign insolvency judgment for the first time.³³ In this case, Foshan Intermediate People's Court in Guangdong Province recognized an Italian insolvency proceeding based on a treaty on judicial assistance in civil matters between the People's Republic of China and the Republic of Italy.³⁴ Upon recognition, the Italian company managed to obtain its 98 per cent shares in Nanhai Nasseti Pioneer Ceramic Machinery Co. Ltd of USD 5.39 million located in the Mainland. At that time, the present 2006 EBL had not come into existence and there was no cross-border insolvency provision in the old law. The decision was made on the basis of the CPL instead of the EBL.

In the subsequent 2005 *Antonie Montier* case, a court in Guangzhou, Guangdong Province, recognized a French insolvency judgment based on the China-France judicial assistance agreement.³⁵ In this case, the applicant Mr Antonie Montier was the liquidator appointed in the French insolvency proceeding for the company *the Pellis Corium*, and he petitioned the Mainland court for recognition of his status as a liquidator. And since his appointment was made in a judgment, it was considered by the judge as a recognizable document.³⁶

After the 2006 EBL came into effect, the reciprocity principle was applied in the 2012 *Sascha Rudolf Seehaus* case, in which the court recognized a German insolvency judgment based on the reason that a German court had previously recognized a Mainland judgment.³⁷ One thing to note is that the court still applied the CPL instead of the EBL. Since the recognition provision in the EBL resembles that in the CPL, the result was not affected. However, it is speculated that judges were more familiar with the CPL but not EBL since at that time cross-border insolvency cases were rare.

In terms of reciprocity, other jurisdictions can be deemed as already having established a reciprocity relationship with the Mainland. For instance, US bankruptcy courts recognized several Mainland insolvency proceedings. In the 2014 case *In re Zhejiang Topoint Photovoltaic Co., Ltd.*, the administrators appointed in China filed a petition to the New

³¹CPL, Art 282.

³²Reply of the SPC to the Request for Instructions on Norstar Automobile Industrial Holding Limited's Application for Recognition of a Court Order of the Hong Kong Special Administrative Region, 28 September 2011 [2011] Min Si Ta Zi No. 19.

³³[2000] Fo Zhong Fa Jing Chu Zi No.663 Civil Ruling. However, the original document cannot be found online.

³⁴For more information about the case, see Jianhong Liu, 'A Case on Application for Recognition and Enforcement of Italian Court Ruling on Bankruptcy' (2003) China Law 32. The author is a judge at Foshan Intermediate People's Court.

³⁵[2005] Sui Zhong Fa Min San Chu Zi No.146 Civil Ruling.

³⁶*Ibid.*

³⁷[2012] E Wu Han Zhong Min Shang Wai Chu Zi No.00016 Civil Ruling. See also *Re KolmarGroupAG* [2016] Su 01 Xie Wai Ren No.3, in which the Nanjing Intermediate People's Court recognised a Singapore judgment based on the reason that a Singaporean court recognised a Chinese judgment before.

Jersey Bankruptcy Court and successfully got the recognition of a Chinese insolvency proceeding.³⁸ In 2019, in the case *In re Reward Science and Technology Industry Group Co, Ltd*, the Bankruptcy Court for the Southern District of New York recognized another Mainland insolvency proceeding.³⁹ In particular, Judge Wiles recognized the status of an administrator appointed by the Chaoyang District Court in Beijing.⁴⁰ In 2020, the Singapore High Court recognized a Mainland judgment concerning insolvency of the *Sainty Marine Development Corporation Ltd*.⁴¹ These cases demonstrate that reciprocity exists between the Chinese Mainland and the US as well as Singapore, and theoretically, Mainland courts in the Mainland may recognize insolvency judgments from the US and Singapore.

2. Recognition of foreign insolvency practitioners

As mentioned in the *Re Antonie Montier* case, a Mainland court can recognize a foreign insolvency practitioner (IP) as long as the appointment is confirmed by a judgment.⁴² However, there is no more public information about the subsequent actions in this case. A possible outcome is that if the functions of the appointed insolvency practitioner are not specified in the judgment, the Mainland court may refuse to grant powers for the IP out of the scope of the original judgment. This issue constitutes one of the obstacles that a foreign insolvency proceeding may encounter when it seeks recognition in the Mainland, given the law is expressly restricted to ‘judgments’ but not ‘proceedings’.

However, Mainland courts adopted innovative approaches to circumvent the constraints in the statutory laws. A case in this regard is the 2014 *Sino-Environment Technology Group Limited, Singapore v Thumb Env-Tech Group (Fujian) Co., Ltd* case.⁴³ This case involved a Singaporean shareholder and a Mainland subsidiary, and the disputed issue was about the subsidiary’s claims of inadequate capital contribution from its shareholder. During the court proceedings, the Singaporean parent company went into administration/insolvency proceedings in Singapore, and the issue was raised before the Mainland court whether the administrator can act as the representative of the Singaporean company. Instead of applying Article 5 of the EBL, the Mainland SPC invoked Article 14 of the Law on Application of Law for Foreign-Related Civil Relationships (LAL) – Mainland conflict-of-laws – and decided that the civil rights and capacity of administrators and liquidators should be governed by the law of the place where the debtor is registered.⁴⁴ Therefore, a competent administrator appointed by a Singaporean court can act as the

³⁸*In re Zhejiang Topoint Photovoltaic Co, Ltd*, case 14-24549 (Bankr DNJ Aug 12, 2014). See, e.g. Jiangxia Shi and Yuanyuan Huang, ‘Sino – U.S Milestone of Cross-Border Bankruptcy Cooperation: Comment on Topoint Solar Case’ (中美跨境破产合作里程碑——“尖山光电案”评析) (2017) 4 Journal of Law Application 51.

³⁹*In re Reward Science and Technology Industry Grp Co, Ltd*, Case No. 19-12908 (MEW) (Bankr SDNY September 9, 2019) [Dkt.1]. See, e.g. Jingxia Shi, ‘Analysis of Cross-Border Insolvency Cooperation Between China and the United States: Taking the Reward Reorganization Proceeding Recognised and Assisted by US Bankruptcy Court, Southern District of New York as Example’ (中美跨境破产合作实例分析: 纽约南区破产法院承认与协助“洛娃重整案”) (2020) China Review of Administration of Justice 94.

⁴⁰Order signed on 10/8/2019 granting recognition of foreign main proceeding and related relief.

⁴¹HC/OS 327/2020, in the High Court of the Republic of Singapore: In the Matter of Schedule 10 of the Companies Act (Cap. 50) and in the Matter of Sainty Marine Development Corporation Ltd. – Order of the Court, 10 June 2020. However, the order is confidential. Information can be accessed from the requesting court – the Nanjing Intermediate People’s Court <<https://mp.weixin.qq.com/s/7YRZEnTi8c5el5rr3l9Vsg>> accessed 8 February 2022.

⁴²See n 35.

⁴³[2014] Min Si Zhong Zi No 20 Civil Ruling. See also comments Tu and Li (n 30).

⁴⁴LAL, Art 14.

legal representative of a company. In this way, the Mainland court *de facto* recognized the effectiveness of a foreign IP through company laws but not insolvency laws.

In a more recent case decided by the Xiamen Maritime Court in August 2021, the Court recognized the status of a judicial administrator appointed by a Singaporean court.⁴⁵ The judges made the decision on the basis of Article 5 of the EBL as well as Article 14 of the LAL. In the reasoning, the judges confirmed the existence of reciprocity between Singapore and the Mainland and therefore granted recognition.⁴⁶ This case shows the progress of Mainland judicial practices of recognizing foreign insolvency practitioners directly from Article 5. However, it cannot be overlooked that the effect of recognition in this case was limited to the legitimate status of the IP participating in the debtor's lawsuits; the recognition request did not concern other activities such as investigation or even transferring assets outside China. It is not clear how Mainland courts would react to these requests, and revisions are needed to the EBL.

C. Cross-border insolvency between the Mainland and Hong Kong

For a long time, there was no cross-border insolvency arrangement between the Mainland and Hong Kong. Mutual recognition entirely depended on each jurisdiction's own laws. Practices of Mainland courts in cross-border insolvency were rare and fragmented, and legal basis was insufficient. As a result, there was no uniform attitude towards recognizing Hong Kong proceeding in the Mainland.

As early as 1983, in the case *LMK Nam Sang Dyeing*, there had been a request for recognition of a Hong Kong receiver in the Mainland. In this case, the parent company in Hong Kong was insolvent, and the receiver appointed in Hong Kong needed to gain control of the assets located in Shenzhen.⁴⁷ Even without clear legal authority, the receiver ultimately had a successful agreement with the local government, resulting in the same effects as if the Hong Kong insolvency proceeding had been fully and unconditionally recognized.⁴⁸ However, in the case of *Liwan District Construction Company* in 1990, the Guangzhou Intermediate People's Court refused to recognize the authority of a Hong Kong representative.⁴⁹

Since the enactment of the 2006 EBL, which did not add additional barriers to cross-border recognition, there has not been a case in which a Mainland court recognized a Hong Kong insolvency proceeding.⁵⁰ In 2011, the SPC issued an opinion concerning the insolvency of *Beitai Holding Company* and refused recognition of the Hong Kong winding-up proceeding, contrary to the opinions of lower courts in Beijing on the same case.⁵¹ The SPC did not specify the reasons. However, it is inferred from the

⁴⁵[2020] Min 72 Min Chu No 334.

⁴⁶The reciprocity test in the judgment also mentions the previous Singaporean case in above n 41.

⁴⁷Jingxia Shi, 'Chinese Cross-Border Insolvencies: Current Issues and Future Developments' (2001) 10 *International Insolvency Review* 33, 38–39.

⁴⁸*Ibid.*

⁴⁹*Ibid.*, 39.

⁵⁰Cases of refusal of recognition include *Moulin Global Eyecare Holdings Ltd* (2006), *Ocean Grand Holdings Limited* (2007), *Golden Dynasty Enterprise Limited* (2008). After thorough research, no other cases were found between 1990 and 2006. See, e.g. Jingxia Shi and Yuanyuan Huang, 'An Empirical Study on Cross-Border Insolvency Cooperation Between Mainland China and Hong Kong SAR' (论内地与香港的跨界破产合作——基于案例的实证分析及建议) (2018) 40 *Modern Law Science* 170.

⁵¹[2011] Min Si Ta Zi No. 19.

words of the SPC compared with those of the lower courts that the SPC believed that the recognition could only be granted to foreign judgments but not ongoing insolvency proceedings. In this case, the document that sought recognition was an order appointing provisional liquidators without confirming an ultimate legal effect and could not constitute a judgment. It is not because of lack of reciprocity, because, as illustrated below, a previous case in which a Hong Kong court recognized a Mainland insolvency proceeding could serve as a reciprocity basis between the Mainland and Hong Kong.⁵² This restrictive interpretation of ‘judgment’ resulted in fragmented practices in the Mainland and showed a conservative position of some judges, at least in 2011, in handling cross-border insolvencies.⁵³

This situation has now been addressed with the arrival of the new Record of Meeting. As a result, intermediate Mainland courts in selected cities are equipped with the authority to recognize Hong Kong insolvency proceedings or give assistance to such proceedings. The SPC’s Opinion follows the modified universalism principle.⁵⁴ Accordingly, recognition can be granted to Hong Kong proceedings provided the debtor’s COMI is in Hong Kong, subject to the condition that the COMI has been in Hong Kong continuously for at least 6 months.⁵⁵ No reciprocity is required. Recognizable Hong Kong insolvency proceedings include compulsory winding up, creditors’ voluntary winding up and schemes of arrangement administered by a liquidator or provisional liquidator and sanctioned by a court of the HKSAR.⁵⁶ Subsequent to recognition, reliefs can be granted to Hong Kong administrators, who can then perform the same duties within the territory of the Mainland as those of Mainland administrators.⁵⁷ Also, upon the request of Hong Kong administrators, a court may appoint a Mainland administrator to assist the case.⁵⁸

Two months after the *Record of Meeting*, Justice Harris from Hong Kong issued an order requesting assistance from the Bankruptcy Court in Shenzhen.⁵⁹ The request was for the purpose of collecting assets located in the Mainland of the insolvent debtor *Samson Paper Company Ltd*. On 15 December 2021, the Shenzhen court recognized the Hong Kong proceeding and granted reliefs to Hong Kong liquidators, on the basis that the debtor’s COMI was in Hong Kong.⁶⁰ This is the first case in the Mainland applying the new arrangement and marks a milestone in cross-border insolvency between the Mainland and Hong Kong.

III. Recognition of Mainland insolvency proceedings in Hong Kong

A. Hong Kong insolvency law framework

The Hong Kong legal system was rooted in English common law for over 150 years.⁶¹ On 1 July 1997, Hong Kong was handed over back to the PRC and became a special

⁵²Text to n 105. Cf. Huang (n 29) 172.

⁵³Shi and Huang (n 50) 171–72.

⁵⁴See n 5.

⁵⁵Opinion, Art 4.

⁵⁶Ibid, Art 2.

⁵⁷Ibid, Art 14.

⁵⁸Ibid, Art 15.

⁵⁹*Re Samson Paper Company Ltd (in Creditor’s Voluntary Liquidation)* [2021] HKCFI 2151.

⁶⁰[2021] Yue No.03 Ren Gang Po No.1.

⁶¹See, e.g. Berry Fong-Chung Hsu, *The Common Law System in Chinese Context: Hong Kong in Transition* (Routledge, 2015).

administrative region of the PRC. Nevertheless, Hong Kong still keeps its common law tradition, contrary to the civil law system in the Mainland. As provided in Article 8 of the Hong Kong Basic Law,

[t]he Laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinated legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.⁶²

The Hong Kong insolvency system is governed by the Bankruptcy Ordinance,⁶³ the Companies (Winding up and Miscellaneous Provisions) Ordinance (CWUMPO),⁶⁴ and the new Companies Ordinance,⁶⁵ which are heavily influenced by English law.⁶⁶ In the Hong Kong law context, ‘bankruptcy’ refers to the insolvency of an individual person, while ‘insolvency’ is used specifically for companies. Therefore, while the Bankruptcy Ordinance regulates mostly bankruptcy of individual persons, the other two regulate insolvency of companies.

The Bankruptcy Ordinance provides the legal framework to enable: (i) ‘A creditor to file a bankruptcy petition with the Court against an individual, a firm or a partner of a firm who owes him/her money’; (ii) ‘A debtor who is unable to repay his/her debts to file a bankruptcy petition against himself/herself with the Court’.⁶⁷ Also, the Bankruptcy Ordinance provides for an alternative to bankruptcy – Individual Voluntary Arrangement (IVA), where ‘a debtor makes a repayment proposal to the Court and the creditors’, and the proposal becomes binding on all creditors if it is approved.⁶⁸

For distressed companies, a common tool in Hong Kong is winding-up, or liquidation, which is mainly regulated by the CWUMPO and Companies (Winding-up) Rules.⁶⁹ Modes of winding-up include: (i) voluntary winding-up, in forms of either members’ (shareholders’) voluntary winding-up or creditors’ voluntary winding-up; and (ii) compulsory winding-up.⁷⁰ Members’ voluntary winding-up is tailored to solvent companies whose shareholders wish to close the business; creditors’ voluntary winding-up and compulsory winding-up apply to insolvent companies. However, Hong Kong lacks a statutory reorganization regime that is parallel to reorganization proceedings in the Mainland. Alternatively, a distressed company can propose with its creditors or shareholders a scheme of arrangement under the Companies Ordinances, subject to the approval of courts and creditors.⁷¹

⁶²Hong Kong Basic Law, Art 8.

⁶³Bankruptcy Ordinance Cap 6.

⁶⁴Companies (Winding up and Miscellaneous Provisions) Ordinance Cap 32. Prior to 2012 Cap 32 was called the Companies Ordinance, but when the new Companies Ordinance came into force, most of the provisions of Cap 32 were repealed except for those relating to insolvency, and thus the ordinance was renamed to reflect the changes.

⁶⁵Companies Ordinance Cap 622.

⁶⁶See, e.g. Charles Booth, ‘Hong Kong Insolvency Law Reform: Preparing for the Next Millennium’ (2001) *Journal of Business Law* 126; Charles Booth and others, *Hong Kong Corporate Insolvency Manual* (4th edn, LexisNexis, 2018).

⁶⁷Official Receiver’s Office, HKSAR, ‘Simple Guide on Bankruptcy’ <www.oro.gov.hk/eng/publications/bankguide.htm> accessed 8 February 2022.

⁶⁸Ibid. Bankruptcy Ordinance, ss 20-20L.

⁶⁹Companies (Winding-up) Rules Cap 32H.

⁷⁰CWUMPO, s 169. Official Receiver’s Office, HKSAR, ‘Simple Guide on Compulsory Winding-Up of Companies (1)’ <www.oro.gov.hk/eng/publications/guidwu.htm> accessed 8 February 2022.

⁷¹Companies Ordinance, ss 669–75.

B. Hong Kong international insolvency law

1. Winding-up of foreign companies

Hong Kong maintains jurisdiction over foreign insolvent companies.⁷² According to the CWUMPO, a company incorporated outside Hong Kong are considered as an unregistered company and may be wound up by a Hong Kong court (i) if it is 'dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs'; (ii) if it is 'unable to pay its debts'; or (iii) if 'the court is of the opinion that it is just and equitable that the company should be wound up'.⁷³

However, the legal text is quite broad and leaves a large discretionary power for judges to decide whether or not to open insolvency proceedings for foreign companies. Following English precedents,⁷⁴ Hong Kong courts gradually developed three core requirements: (i) there is a sufficient connection with Hong Kong (but not necessarily the assets within the jurisdiction); (ii) there is a reasonable possibility that the winding-up order would benefit those applying for it; and (iii) the Hong Kong court is able to exercise jurisdiction over one or more persons in the distribution of the company's asset.⁷⁵ These three conditions were confirmed in the landmark decision of *Kam Leung Sui Kwan v Kam Kwan Lai & Ors*,⁷⁶ and more recently, in *Shandong Chenming Paper Holdings Limited v Arjo-wiggins HKK2 Limited*.⁷⁷

2. Discharging debts governed by a foreign law

In procedures of sanctioning schemes of arrangements, judges are often faced with the question of whether they should discharge debts governed by foreign law. In the English common law tradition, the *Gibbs* rule established that a debt governed by English law cannot be discharged in a non-English insolvency proceeding.⁷⁸

Justice Harris summarized in *Re Winsway Enterprises Holdings Ltd* that sanctioning a scheme with foreign-law-governed debts needs to consider three dimensions. First, 'differences in the governing law of various debts to be compromised do not require creditors to be divided into separate classes for voting purposes'.⁷⁹ Second, the *Gibbs* rule does not preclude the jurisdiction of a court to sanction a scheme.⁸⁰ Third, it is necessary to consider whether sanctioning a scheme would achieve the objective of a compromise, in particular, whether a foreign court would recognize it.⁸¹ In *Re China Lumena New Materials Corp*, Justice Harris continued his reasoning in the *Winsway* case and held that the *Gibbs* rule does not preclude the jurisdiction of a court to sanction a

⁷²See, e.g. Alexander Loke, 'Winding Up of a Foreign Company on the Just and Equitable Ground: *Re Yung Kee Holdings Ltd*' (2016) *Singapore Journal of Legal Studies* 336.

⁷³CWUMPO, s 327. See also *Securities and Futures Commission v MKI Corporation* [1995] 2 HKC 79.

⁷⁴See, e.g. *Re Real Estate Development Company* [1991] BCLC 210 at 217c.

⁷⁵Summarised by Kwan J in *Re Beauty China Holdings Ltd* [2009] 6 HKC 351 [23] (citing *Re Zhu Kuan Group Company Ltd*, HCCW No 874 of 2003, 2 August 2004).

⁷⁶(2015) 18 HKCFAR 501. See comments Jing Yang, 'Basis of Determination on the Jurisdiction of Cross-Border Enterprise Group Bankruptcy' (跨境企业集团破产管辖权的确定依据) (2020) *People's Judicature Application* 9.

⁷⁷[2020] HKCA 670.

⁷⁸*Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 (CA).

⁷⁹[2017] 1 HKLRD 1 [35]. See also Eloise Matsui, 'Re Winsway Enterprises Holdings Ltd ("Winsway")', in *III Next Gen 10th Anniversary Case Book* (forthcoming).

⁸⁰*Winsway* (n 79) [36].

⁸¹*Ibid.*, [37].

scheme, but affects a judge's decision whether or not to approve the scheme as the court 'will not sanction a scheme, which has no, or limited, utility'.⁸²

In the case *In re Freeman Fintech Corporate Ltd*, Justice Harris was faced with the question of discharging Mainland creditors' debts governed by Macanese law. Based on the above principle, Justice Harris ruled that '[t]he Company has no assets in Macau and enforcement in Macau is not of concern to the Company and has no bearing on the utility of the Scheme'.⁸³ And therefore, PRC creditors would not be impacted adversely on the utility of the scheme, so the sanction was ordered.⁸⁴

3. Recognition of foreign insolvency proceedings

Hong Kong has a long history recognizing foreign insolvency proceedings according to its common law tradition without adopting the MLCBI or other statutory rules.⁸⁵ On the basis of the principle of comity, Hong Kong judges had recognized foreign insolvency proceedings.⁸⁶ In *Re Irish Shipping Ltd*, Justice Jones concluded that:

[a]nother factor that I have taken into account in exercising my discretion is the comity of nations whereby it is desirable that the court should assist the liquidator in another jurisdiction to carry out his duties unless good reasons to the contrary have been put forward and I find none in this case.⁸⁷

Through the precedents, Hong Kong courts gradually developed their system for recognizing foreign insolvency proceedings: (i) the insolvency proceeding was commenced in the residence country of the individual/company;⁸⁸ (2) the insolvency proceeding was a collective proceeding in parallel to Hong Kong insolvency proceeding.⁸⁹ In *Re Mr Kaoru Takamatsu*, a Hong Kong court for the first time recognized a non-common law jurisdiction's insolvency proceeding from Japan, based on the same conditions.⁹⁰

In several more recent cases, Hong Kong courts are gradually shifting to the COMI test.⁹¹ For example, in *Re Lamtex Holdings Ltd*, Justice Harris explored the possibility to apply COMI under Hong Kong law.⁹² He concluded that '... it is a matter for the courts of Hong Kong to address using the techniques available at common law' even without clear legislation referring to COMI, and he held that 'common law ... contains sufficient flexibility ... and there is nothing in principle preventing recognition of liquidators appointed in a company's COMI'.⁹³ He then summarized several factors to determine COMI other than the place of incorporation: (i) 'Is the company a holding company

⁸²[2020] HKCFI 338 [10].

⁸³[2021] HKCFI 310 [11].

⁸⁴*Ibid.*

⁸⁵Tu and Li (n 30); Scott Atkins and Kai Luck, 'Cross-Border Insolvency in Hong Kong: Will the New Cooperation and Coordination Framework with Mainland China Provide the Impetus for Broader Reform?' (2021) 18 *International Corporate Rescue* 165.

⁸⁶[1985] HKLR 437.

⁸⁷*Ibid.*, 445.

⁸⁸*Re China Lumena New Materials Corp* (n 82).

⁸⁹*Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277; [2018] 1 HKLRD 1120 [12] (citing *Joint Official Liquidators of A Company v B* [2014] 4 HKLRD 374). See also, e.g. Xiaolin Li and Guangjian Tu, 'Recent Development in Recognition of and Assistance to Foreign Insolvency Representatives Under the Hong Kong Common Law' (2018) 27 *International Insolvency Review* 32, 44–47.

⁹⁰*Re Mr Kaoru Takamatsu* [2019] HKCFI 802 [5].

⁹¹See, e.g. *Re Ping An Securities Group (Holdings) Ltd* [2021] HKCFI 651.

⁹²[2021] HKCFI 622.

⁹³*Ibid.*, [22].

and, if so, does the group structure require the place of incorporation to be the primary jurisdiction in order effectively to liquidate or restructure the group'; (ii) 'The extent to which giving primacy to the place of incorporation is artificial having regard to the strength of the COMI's connection with its location'; and (iii) 'The views of creditors'.⁹⁴ He further decided that COMI in this case is in Hong Kong rather than Bermuda where the company is incorporated and thus reliefs cannot be granted to adjourn Hong Kong proceedings.⁹⁵

Upon recognition, additional reliefs may be granted.⁹⁶ Foreign liquidators have obtained permission from Hong Kong courts for their investigations on the affairs of the companies, oral examinations or third-party examinations,⁹⁷ seizure of assets for distribution to creditors in foreign proceedings,⁹⁸ as well as production of documents and other information of third parties located in Hong Kong.⁹⁹ However, recognition does not mean that Hong Kong proceedings should be automatically stayed.¹⁰⁰

Hong Kong courts maintain that assistance will not be provided to a foreign insolvency administrator unless the orders sought would be available to an IP under Hong Kong's local laws. This is because the courts are bound by the limits of their own statutory and common law powers.¹⁰¹ For instance, in *Joint Provisional Liquidators of BJB Career Education Company Limited (in provisional liquidation) v Xu Zhendong*, Justice Harris held that assistance can only extend to ordering an oral examination if such a power (a) 'exists in the jurisdiction of liquidation and that is the jurisdiction of the place of incorporation' and (b) 'the power exists in the assisting jurisdiction; as is the case in Hong Kong'.¹⁰² Similarly, in *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*, the English High Court issued a letter requesting that the Hong Kong Companies Court make orders recognizing an administration occurring under the supervision of the English High Court and preventing a Hong Kong entity from enforcing a security interest over the shares of the foreign company in administration.¹⁰³ Justice Harris declined to do so on the basis that, in the absence of an administration regime in Hong Kong, including moratoria restricting the enforcement rights of secured creditors, granting the requested orders would enable the administrators to exercise powers not available to a liquidator appointed in Hong Kong.¹⁰⁴

⁹⁴Ibid, [35].

⁹⁵Ibid.

⁹⁶Assistance had been granted before 1997, e.g. *Re Russo-Asiatic Bank* [1929–1930] 24 HKLR 16; *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512; *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd – Macau Branch* [1997] HKLRD 304.

⁹⁷*Re BJB Career Education Co Ltd* [2017] 1 HKLRD 113.

⁹⁸*Re Joint Official Liquidators of Centaur Litigation SPC* [2016] HKEC 576.

⁹⁹*Re Rennie Produce (Aust) Pty Ltd* [2016] HKEC 2012; *Re Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* [2017] HKEC 1461.

¹⁰⁰*Re FDG Electric Vehicles Ltd (Provisional Liquidators Appointed)* [2020] HKCFI 2931.

¹⁰¹Charles Zhen Qu and Andrew Godwin, 'Does the Common Law Power to Grant Cross-Border Insolvency Assistance Apply to an Insolvency Winding-Up That Is Voluntary? The Reaction to Singularis from Singapore and Hong Kong' (2019) 28 *International Insolvency Review* 305.

¹⁰²[2016] HKCFI 1930 [7].

¹⁰³[2015] 4 HKC 215.

¹⁰⁴Ibid.

C. Cross-border insolvency between Hong Kong and the Mainland

There have been several cases in which Hong Kong courts recognized Mainland insolvency proceedings. The first case appeared in 2001, where Judge Gill decided to recognize a Mainland proceeding in the *GITIC* case and stayed the individual proceeding in Hong Kong.¹⁰⁵ A variety of factors were considered in the judgment, including the universal characteristic of the Mainland proceeding,¹⁰⁶ the *pari passu* principle that had been adhered to in this case,¹⁰⁷ and international comity.¹⁰⁸ However, the liquidators in this case did not actively seek recognition in the Hong Kong Court, instead, recognition was filed as a defence mechanism to block proceedings in Hong Kong.

After the *GITIC* case, Hong Kong courts dealt with a few cross-border insolvency cases involving Mainland enterprises.¹⁰⁹ However, no direct recognition request was filed from the Mainland. Many Mainland enterprises set up holding companies or subsidiaries in Hong Kong and other offshore jurisdictions for financing or other purposes, and thus cross-border insolvencies were often managed between Hong Kong and these offshore jurisdictions.¹¹⁰ On the contrary, the attitudes of Mainland courts were fragmented, and some judges were conservative in participating in cross-border insolvencies.¹¹¹

After almost two decades, in 2019, Justice Harris once again recognized a Mainland proceeding in the *Re CEFC Shanghai International Group Limited* case, on the basis of the following statements: (i) ‘the foreign insolvency proceedings are collective insolvency proceedings’;¹¹² and (ii) ‘the foreign insolvency proceedings are opened in the company’s country of incorporation’.¹¹³ In this case, Hong Kong for the first time recognized the status of Mainland administrators.¹¹⁴ A few months later, in May/June 2020, Justice Harris granted recognition and relief to another Mainland proceeding in *Re Shenzhen Everich Supply Chain Co Ltd*, based on the same considerations.¹¹⁵ Justice Harris valued cooperation with the Mainland but emphasized that ‘the development of recognition [in Hong Kong] is likely to be influenced by the extent to which the court is satisfied that the Mainland, like Hong Kong, promotes a unitary approach to transnational insolvencies’.¹¹⁶

Under the new cooperation arrangement, the Practical Guide provides that a Mainland bankruptcy administrator may file an application to the Court of First Instance of the High Court of the HKSAR, with a letter of request from a Mainland court that appointed the

¹⁰⁵*CCIC Finance Ltd v Guangdong International Trust & Investment Corp*, HCA 15651/1999 (31 July 2001).

¹⁰⁶*Ibid.*, [84].

¹⁰⁷*Ibid.*

¹⁰⁸*Ibid.*, [93]–[95].

¹⁰⁹See, e.g. *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; *Re Pioneer Iron and Steel Group Co Ltd* [2013] HKCFI 324.

¹¹⁰For a summary of these cases see Emily Lee, ‘Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China’ (2015) 63 *American Journal of Comparative Law* 439, 451.

¹¹¹See above Section II.C; Shi and Huang (n 50) 172–74.

¹¹²[2020] HKCFI 167 [8] (citing *Re Joint Provisional Liquidators of China Lumina New Materials Corp* [2018] HKCFI 276).

¹¹³*Ibid.* (citing *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] HKCFI 277; [2018] 1 HKLRD 1120 [12]).

¹¹⁴See comments, e.g. Jingxia Shi, ‘Recognition and Assistance of Insolvency Proceedings in Mainland China by HKHC: from the Perspective of the *Re CEFC Shanghai Case*’ (香港法院对内地破产程序的承认与协助——以华信破产案裁决为视角) (2020) 42 *Global Law Review* 162; Shuo Zhang, ‘From “Guangxin Case” to the “Huaxin Case”: The New Development of Hong Kong Courts’ Recognition and Assistance to Mainland Companies’ Cross-Border Bankruptcy Liquidation’ (从“广信案”到“华信案”: 香港对内地公司跨境破产清算承认与协助的新发展) (2020) *National Judges College Journal* 41.

¹¹⁵[2020] HKCFI 965.

¹¹⁶[2020] HKCFI 167 [33].

bankruptcy administrator.¹¹⁷ The way a Mainland administrator can arrange for this letter of request is subject to Mainland law. The administrator then can, on an *ex parte* basis, apply to the Court of First Instance by originating a summons with affidavit/affirmation evidence for a standard-form order.¹¹⁸ The Practical Guide is rather short with substantive rules. The traditional Hong Kong common law still applies.

After the new arrangement came into effect, in September 2021, Hong Kong for the first time recognized a Mainland reorganization proceeding concerning the *Hainan Airlines Group*.¹¹⁹ Justice Harris reasoned in his judgment that ‘the present case the Mainland reorganisation concerns all of the Company’s creditors and its character is clearly properly characterized as a collective insolvency procedure’, and therefore, ‘it should be and it capable of being recognized in Hong Kong’.¹²⁰ Also, he mentioned the cooperation agreement between the SPC and the Secretary for Justice in Hong Kong as an additional supporting argument.¹²¹

In December 2021, Justice Harris recognized the status of the administrators appointed in the reorganization of the *Peking University Founder Group (PUFG) Company Ltd* commenced in Beijing, yet he refused to grant reliefs requested by the administrators to suspend the creditors’ actions in the Hong Kong court.¹²² This case concerned the creditors of Keepwell Deeds who brought actions in Hong Kong to have their claims determined. Keepwell Deeds are commonly used by Mainland debtors in offshore finance transactions where an onshore parent company ‘undertakes to ensure the solvency and financial stability of its offshore subsidiaries that issue bonds or loans in order to service the loan or bond for the duration of the agreement’.¹²³ Unlike the United Kingdom and Hong Kong, in the Mainland Keepwell Deeds are not considered as providing guarantee with binding effects and cannot be categorized as creditors’ claims,¹²⁴ except that a Mainland court may recognize a foreign judgment acknowledging the liability of debtors, since recognition of foreign judgments in China does not need to examine substantive issues.¹²⁵ The disputed issue in the *PUFG* case was whether the Hong Kong court had jurisdiction while the insolvency proceeding of the debtor had commenced in Beijing. This issue is not mentioned in the new cooperation arrangement, and Beijing is not among the three trial cities. Justice Harris maintained that the Keepwell Deeds contained an exclusive dispute resolution clause subject to Hong Kong courts and the court could keep its jurisdiction.¹²⁶ He doubted the Beijing court had a better position than the Hong Kong court to decide on English-law governed deeds.¹²⁷ He agreed with Prof. Jingxia Shi, a leading Chinese insolvency law professor who provided an expert statement for the *PUFG*, that the Mainland and Hong Kong intended to enhance

¹¹⁷Practical Guide, Art 1.

¹¹⁸Practical Guide, Art 2.

¹¹⁹[2021] HKCFI 2897.

¹²⁰*Ibid*, [8].

¹²¹*Ibid*, [9].

¹²²*Nuoxi Capital Ltd and others v Peking University Founder Group Company Ltd*, HCA 778/2021, HCA 798/2021, HCA 1418/2021, HCA 1442/2021 and HCMP 1831/2021 [2021] HKCFI 3817.

¹²³KWM, ‘Keepwell and Carry On: Enforcement of Keepwell Deeds Put to the Test in China’, <www.kwm.com/hk/en/insights/latest-thinking/keepwell-and-carry-on-enforcement-of-keepwell-deeds-put-to-the-test-in-china.html> accessed 8 February 2022.

¹²⁴*Ibid*.

¹²⁵See, e.g. [2019] Hu No. 74 Ren Gang No.1 Civil Ruling made by the Shanghai Financial Court.

¹²⁶*Ibid*, [63].

¹²⁷*Ibid*.

cooperation and coordination in cross-border insolvency cases; however, he was not satisfied with the cooperation the Beijing court and Beijing Administrators provided and ruled that ‘under Hong Kong law the application for a stay is not as straight forward as it may have been led to believe’.¹²⁸ This case suggested that the new cooperation arrangement does not guarantee recognition and quite a few issues were left unaddressed. It seems unlikely that a cross-border insolvency arrangement would regulate the validity of Keepwell Deeds, but it could contain jurisdiction provisions on which courts can adjudicate disputes or how to grant reliefs.

IV. Closing the gaps for future Mainland–Hong Kong cross-border insolvency

With the increasing cross-border transactions between the Mainland and Hong Kong, there has also been an increasing need for cross-border judicial assistance.¹²⁹ The new cooperation arrangement addressed some issues but not all, and at the moment, only applicable in three Mainland cities. An updated agreement will be implemented in the whole Mainland territory after Mainland judges gain some experience in this regard.¹³⁰ This article proposes legislative reforms with the evaluation of the present provisions.

A. Evaluation of the present situation

1. COMI, establishment and parallel proceedings

The modern international insolvency law is based on the general principle of modified universalism, which can be seen as having been accepted in the Mainland¹³¹ and Hong Kong.¹³² One manifestation of modified universalism is the dual existence of main and nonmain/secondary proceedings, and the distinction of COMI and establishment.

The new SPC’s Opinion for the first time introduced COMI and interprets COMI as ‘the place of incorporation of the debtor’, which is the registration place of the debtor.¹³³ In addition, the courts shall consider other factors such as the place of principal office, the principal place of business, the place of principal assets, and so on¹³⁴ This seems to be in line with the MLCBI and the EIR.¹³⁵ However, the MLCBI and the EIR also require the COMI to be ‘ascertainable by third parties’.¹³⁶ According to one author affiliated with the SPC, the Opinion intentionally leaves out this criterion because ascertainability is hard to determine and can be used to deceive creditors, in the way of the debtor making the place of incorporation ascertainable by creditors when actually managing

¹²⁸Ibid, [64]–[68].

¹²⁹Meng Seng Wee, ‘The Belt and Road Initiative, China’s Cross-Border Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency’ (2020) 8 Chinese Journal of Comparative Law 116; Yanni Yue, Shan Tang, Fang Wang, ‘Practical Exploration of Bankruptcy Crossing Mainland and Hong Kong SAR’ (内地与香港跨境破产的实践探索) (2020) People’s Judicature Application 4.

¹³⁰Si, Zhang and Liu (n 7); Kun Liu, ‘The Jurisdiction Issue in Cross-Border Insolvency Assistance’ (跨境破产协助中的管辖权问题) (2021) Journal of Law Application 47.

¹³¹Parry and Gao (n 30); Si, Zhang and Liu (n 7).

¹³²Wee (n 10) 3–5; *Joint Official Liquidators of A Company v B* [2014] 4 HKLRD 374 [10].

¹³³Opinion, Art 4.

¹³⁴Ibid.

¹³⁵*In re SPhinX Ltd*, 351 BR 103, 117 (Bankr SDNY 2006).

¹³⁶MLCBI Guide, 71; EIR 2015, Art 3(1). See CJEU Case C-341/04 *Eurofood IFSC Ltd* EU:C:2006:281 [33]. See also the UK: *Re Videology Ltd* [2018] EWHC 2186 (Ch); Singapore: *In the Matter of Zetta Jet Pet. Ltd and Zetta Jet USA, Inc* [2019] SGHC 53.

the business in another jurisdiction.¹³⁷ This understanding seems to be contrary to the general international position that deception happens when the COMI is not ascertainable by creditors.¹³⁸ In the United States where ascertainability is not prescribed in statutory laws, judges also take into account this factor by their common law powers.¹³⁹ The SPC's Opinion neglects that ascertainability should be taken in conjunction with other factors and cannot be the sole legal basis. At least it could be one of the reasons for judges to consider and should not be entirely excluded.

It is interesting to note that the concept of COMI is only prescribed in the SPC' Opinion, but not in the HKSAR's Practical Guide. Hong Kong will continue its common law traditions. Previously, Hong Kong courts heavily relied on the place of incorporation as a decisive factor to determine whether to grant recognition.¹⁴⁰ But as shown in the *Lamtex* and *Ping An Securities Group* cases,¹⁴¹ Hong Kong courts are gradually turning to the COMI test, which is in line with the international practices and takes into account more substantive interests of debtors and creditors.¹⁴²

What is missing in the new cooperation arrangement is the acknowledgment of establishment and/or nonmain/secondary proceedings. The SPC's Opinion indicates parallel proceedings are allowed. Article 19 suggests two proceedings may simultaneously be opened in both the Mainland and Hong Kong.¹⁴³ Article 20 stipulates that assets within the Mainland should be paid to preferential claims under the law of the Mainland, before they are transferred to Hong Kong, implying the existence of parallel proceedings.¹⁴⁴

However, it is not clear under what circumstances parallel proceedings could be opened, which are often needed for the administration of cross-border insolvency.¹⁴⁵ Does it need a mutual agreement that the COMI of a debtor is located in either the Mainland and Hong Kong and the establishment is in another? Or can it be determined unilaterally by courts in one jurisdiction without deliberation with courts in another? The silence on 'establishment' brings uncertainty for practice. Since most cross-border companies have economic activities in both jurisdictions, an explicit reference to 'establishment' is needed.

2. Recognition and reliefs

According to the Record of Meeting, recognition can be granted to various insolvency proceedings appointed in either the Mainland or Hong Kong, recognizing the status of

¹³⁷Liu (n 130) 51.

¹³⁸Xenia Kler, 'COMI Comity: International Standardization of COMI Factors Needed to Avoid Inconsistent Application within Cross-Border Insolvency Cases' (2018) 34 Am U Int'l L Rev 429.

¹³⁹*In re Betcop, Ltd* 400 BR 266, 291 (Bankr D Nev 2009).

¹⁴⁰Li and Tu (n 89); Qu and Godwin (n 101).

¹⁴¹*Re Lamtex Holdings Ltd* [2021] HKCFI 622; *Re Ping An Securities Group (Holdings) Ltd* [2021] HKCFI 651.

¹⁴²Look Chan Ho, 'Heralding a New and Healthy Era of Cross-Border Insolvency Recognition in Hong Kong: Re FDG Electric Vehicles Ltd, Re Lamtex Holdings Ltd, and Re Ping An Securities Group (Holdings) Ltd' (*Des Voeux Chambers*, 15 March 2021) <www.dvc.hk/news/cases-detail/heralding-a-new-and-healthy-era-of-cross-border-insolvency-recognition-in-hong-kong-re-fdg-electric-vehicles-ltd-re-lamtex-holdings-ltd-and-re-ping-an-securities-group-holdings-ltd> accessed 8 February 2022.

¹⁴³SPC Opinion, Art 19.

¹⁴⁴SPC Opinion, Art 20.

¹⁴⁵Concerns have been expressed before the adoption of the new Record of Meeting, e.g. Zhiyong Fan and Yangguang Xu, 'Analysis and Improvement of China's Cross-border Bankruptcy System Regulation: Centered on the Parallel Process Model of Cross-border Bankruptcy' (我国跨境破产制度的规范评析与完善路径——以跨境破产平行模式为中心) (2021) *Journal of Fujian Normal University (Philosophy and Social Sciences Edition)* 96.

an insolvency practitioner, i.e. an administrator in the Mainland or a liquidator or a provisional liquidator in Hong Kong.¹⁴⁶ Also, assistance can be granted for discharge of the IP's duties.¹⁴⁷

The SPC's opinion additionally specifies that an IP appointed by a Hong Kong court can apply for recognition and assistance in a Mainland court.¹⁴⁸ Recognition can be granted to both the insolvency proceeding and the status of the IP.¹⁴⁹ Before a recognition decision is made, preservation measures can be imposed in accordance with Mainland laws.¹⁵⁰ Upon recognition, pending lawsuits should be suspended and can only be resumed after the Hong Kong IP takes over the debtor's assets.¹⁵¹ Previous preservation measures should be lifted but the execution procedures should be suspended.¹⁵² After recognition, the Hong Kong IP can perform duties such as taking over assets, books and records, making investigations and inquiries, operating daily businesses and managing the assets, participating in legal actions on behalf of the debtor, accepting the declaration of claims by Mainland creditors, as well as other duties allowed by mainland courts.¹⁵³ However, performing these responsibilities is subject to the provisions governing the responsibilities of Mainland IPs in the EBL.¹⁵⁴ This requirement is similar to that in Hong Kong.¹⁵⁵ Additional reliefs that can be granted by Mainland courts include the realization of debtors' assets, distribution of the assets, debt restructuring arrangement, termination of insolvency proceedings, and so on¹⁵⁶

In short, the new cooperation arrangement has made substantive progress with regard to recognition and granting reliefs. However, the list of the reliefs is limited,¹⁵⁷ with a range of reliefs not clearly specified such as granting moratorium.¹⁵⁸ In addition, the different Mainland and Hong Kong legal systems may lead to enforcement challenges.¹⁵⁹ For instance, the *Gibbs* rule is not addressed in the present arrangement, nor are conflict-of-law rules concerning other matters such as set-off or right *in rem*.¹⁶⁰ In the *Re China Lumena New Materials Corp* case, Justice Harris analysed the possibility of Mainland courts to recognize schemes sanctioned in Hong Kong.¹⁶¹ Although the cooperation arrangement did not exist at the time, Justice Harris was convinced that the Mainland creditors would not object to the scheme on the mere basis that the debts were bound by Mainland law.¹⁶² However, this opinion is not reflected in the new cooperation

¹⁴⁶Record of Meeting, [2] and [3].

¹⁴⁷*Ibid.*

¹⁴⁸SPC Opinion, Art 5.

¹⁴⁹*Ibid.*, Art 10.

¹⁵⁰*Ibid.*, Art 9.

¹⁵¹*Ibid.*, Art 12.

¹⁵²*Ibid.*, Art 13.

¹⁵³*Ibid.*, Art 14.

¹⁵⁴*Ibid.*

¹⁵⁵See n 101.

¹⁵⁶SPC Opinion, Art 16.

¹⁵⁷Cf. MLCBI, Arts 19–21; Chun Jin, 'Recognition of and Assistance in Foreign Insolvency Proceedings in China: Interpretation and Legislation' (外国破产程序的承认与协助: 解释与立法) (2019) 37 *Tribune of Political Science and Law* 143.

¹⁵⁸*Peking University Founder Group* (n 122).

¹⁵⁹Si, Zhang and Liu (n 7); Wang (n 14).

¹⁶⁰Cf EIR 2015, Arts 7–18.

¹⁶¹*Re China Lumena new Materials Corp* (n 82) [10].

¹⁶²*Ibid.* [14].

arrangement, and it is still uncertain how mainland courts would react to conflict-of-law issues.

3. Public policy exceptions

The SPC's Opinion generally provides that the People's Courts shall refuse to recognize or assist Hong Kong proceedings if the basic principles of the law of the Mainland are violated, or public order and good morals are offended.¹⁶³ This is similar to the MLCBI and the EIR, which also prescribes a 'public policy exception'.¹⁶⁴ However, the Opinion stipulates more circumstances where refusal of recognition can be made: (i) the COMI of the debtor is not (or has been for less than 6 months) in Hong Kong; (ii) Article 2 of the Enterprise Bankruptcy Law (the debtor cannot repay its debts due, its assets cannot repay all the debts, or the debtor apparently lacks the ability to repay its debts) is not satisfied; (iii) Mainland creditors are not treated equally; (iv) fraud; (v) other circumstances in which the Peoples' Courts consider that recognition or assistance should not be rendered.¹⁶⁵

By contrast, the MLCBI and the EIR only limit public policy exceptions to 'fundamental principles of law, in particular, constitutional guarantees' with a restrictive interpretation approach.¹⁶⁶ Such a restrictive interpretation approach has been confirmed and applied in the US and EU.¹⁶⁷ The *Qimonda* case extensively analyses the application of this public policy exception and generalizes three principles: (1) '[t]he mere fact of conflict between foreign law and [local] law, absent other considerations, is insufficient to support the invocation of the public policy exception';¹⁶⁸ (2) '[d]eference to a foreign proceeding should not be afforded ... where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections'; and (3) '[a]n action should not be taken ... where taking such action would frustrate a [local] court's ability to administer the [recognition] proceeding and/or would impinge severely a ... constitutional or statutory right, particularly if a party continues to enjoy the benefits of the [recognition] proceeding'.¹⁶⁹

The underlying principle of modified universalism poses restrictions on invoking public policy exceptions, which may bring uncertainties in cross-border cases and impede the successful administration of insolvency.¹⁷⁰ The general legal principle of efficiency requires the removal of obstacles to cross-border insolvency;¹⁷¹ and the principle of cooperation also maintains that refusal of recognition should be limited to exceptional

¹⁶³SPC Opinion, Art 20.

¹⁶⁴MLCBI, Art 6; EIR 2015, Art 33. See, e.g. Scott C Mund, '11 USC 1506: US Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine Internationals Cooperation in Insolvency Proceedings Remains' (2010) 28 *Wisconsin International Law Journal* 325; Elizabeth Buckel, 'Curbing Comity: the Increasingly Expansive Public Policy Exception of Chapter 15' (2013) 44 *Georgetown Journal of International Law* 1281.

¹⁶⁵Opinion, Art 18.

¹⁶⁶MLCBI Guide, [102] and [104].

¹⁶⁷*In re Qimonda AG*, 433 BR 547 (ED Va 2010); *Eurofood* [62]–[63]. See also Virgós-Schmit Report [206].

¹⁶⁸*Qimonda*, at 570. See also *In re British American Isle of Venice (BVI), Ltd*, 441 BR 317 (Bankr SD Fla 2010); *In re Rede Energia SA*, 515 BR 69 (Bankr SDNY 2014).

¹⁶⁹*Qimonda*, at 570. See also *In re ABC Learning Ctrs*, 728 F3d (3d Cir 2013); *In re Ashapura Minechem Ltd*, 480 BR 129 (SDNY 2012); *In re Manley Toys Limited*, 580 BR 632 (Bankr DNJ 2018).

¹⁷⁰Bork (n 2) 37–39.

¹⁷¹MLCBI, Preamble; Bork (n 2) 78 et seq; Stan Bernstein, Susan Seabury and Jack Williams, *Business Bankruptcy Essentials* (American Bar Association, 2009) 30 et seq.

situations.¹⁷² Chinese scholars agree with a restrictive interpretation of public policies,¹⁷³ yet it remains to be seen how judges will decide in future cases.

A. A future framework for Mainland–Hong Kong cross-border insolvency

1. Choice of model

At the international level, the two instruments that deal with international insolvency – the MLCBI and the EIR – are models for other jurisdictions.¹⁷⁴ The MLCBI is an instrument that can be unilaterally adopted by one jurisdiction only; the EIR is a multi-jurisdiction model agreed by the EU Member States and involves more complex rules such as applicable law, cooperation and communication and group insolvencies.¹⁷⁵ Even with a higher level of difficulty, this article proposes that the future Mainland–Hong Kong cross-border insolvency arrangement should include more detailed provisions following the EIR model.

First, the Mainland–Hong Kong relationship resembles that of the EU Member States, where each jurisdiction maintains its own legal systems. The Mainland and Hong Kong fall under the so-called one country, two systems regime where the Mainland and Hong Kong retain two different legal systems under one sovereign state.¹⁷⁶ Similarly, EU Member States have diverse legal traditions of 28 (now 27) countries and have different positions towards sensitive insolvency law issues such as security interest, privilege and priority claims.¹⁷⁷ However, the EU ultimately found a way to circumvent these substantive conflicts and offered a solution for cross-border insolvency.¹⁷⁸ This is a successful example of overcoming legal barriers between different jurisdictions and could be an inspiration for the future Mainland–Hong Kong cross-border insolvency. Both the Mainland and Hong Kong can continue their current insolvency regimes but jointly agree on a more efficient mechanism for mutual recognition of insolvency proceedings.

Second, cross-border insolvency cases between the Mainland and Hong Kong need comprehensive rules and enhanced cooperation and communication, which cannot be achieved by simply adopting the MLCBI. The MLCBI only provides rules on recognition and reliefs without specific guidance on other issues such as jurisdiction or applicable laws.¹⁷⁹ The recent *PUGF* case demonstrated the insufficiency of the new cooperation arrangement, that is, the lack of jurisdiction rules on insolvency-related actions. In the EIR 2015, this issue is addressed by Article 6, which provides that the court within the territory of which insolvency proceedings have been opened shall have jurisdiction for

¹⁷²Bob Wessels, Bruce A Markell and Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (OUP, 2009).

¹⁷³See, e.g. Xiaoli Gao, *On the Application of Public Policy in Private International Law* (论国际私法上的公共政策之运用) (PhD, University of International Business and Economics, 2005); Decai Ma, *A Study of the Order Public in Private International Law* (国际私法中的公共秩序研究) (PhD, Wuhan University, 2010); Shuai Guo, *Recognition of Foreign Bank Resolution Actions* (Edward Elgar, 2022, forthcoming) 210–15.

¹⁷⁴Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 *International Insolvency Review* 246.

¹⁷⁵*Ibid.*

¹⁷⁶See n 8.

¹⁷⁷Virgos-Schmit Report [5].

¹⁷⁸*Ibid.* See also, e.g. Wessels Bob, *International Insolvency Law Part II: European Insolvency Law* (4th edn, Kluwer, 2017); Gabriel Moss, Ian F Fletcher, Stuart Isaacs (eds.), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd edn, OUP, 2016).

¹⁷⁹Bork (n 174).

insolvency-related actions.¹⁸⁰ Should a similar provision be in place between the Mainland and Hong Kong, the case would be more easily decided.¹⁸¹ In addition, the EIR provides a set of rules on cooperation and communication between insolvency practitioners,¹⁸² between courts,¹⁸³ and between insolvency practitioners and courts,¹⁸⁴ and even the costs allocation.¹⁸⁵ The EIR also stipulates secondary proceedings and regulates its territorial effects, as well as rules on conflict-of-laws¹⁸⁶ and group insolvency (added in the 2015 version).¹⁸⁷ These matters also need to be addressed in cross-border insolvencies between the Mainland and Hong Kong.

Third, the successful negotiations of the EIR heavily rely on the EU internal market and Article 81 of the Treaty of the Functioning of the European Union (TFEU).¹⁸⁸ Both economic and legal foundations exist between the Mainland and Hong Kong to form such comprehensive rules. The economic incentive to reach an efficient and effective regime for cross-border insolvency between the Mainland and Hong Kong is closely related to the increasing cross-border business transactions.¹⁸⁹ In terms of legal foundation, Article 95 of the Basic Law of the HKSAR states that '[t]he Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other'.¹⁹⁰ This provision forms the constitutional basis for mutual recognition between the Mainland and Hong Kong.¹⁹¹ Under the 'one country, two systems' regime, the Mainland and Hong Kong are both territories of the People's Republic of China in the same sovereign state. The political difficulty of reaching a comprehensive cross-border insolvency regime should be less than that among the EU Member States. The real problem, as this article speculates, is the lack of knowledge and judicial practices. However, this difficulty can be easily addressed with training on judges and lawyers.

Nevertheless, the successful application of the EIR is accompanied with the Court of Justice of the European Union (CJEU), which is empowered to provide preliminary rulings on Union laws and ensure their consistent interpretations.¹⁹² It is acknowledged that the Mainland and Hong Kong maintain different legal systems and there is not a judicial body that can interpret both Mainland and Hong Kong laws. However, the National People's Congress (NPC), acting as the highest legislative body in China, can interpret and coordinate different interpretation of the Hong Kong Basic Law,¹⁹³ which forms

¹⁸⁰EIR 2015, Art 6. See, e.g. CJEU Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] ECLI:EU:C:2009:83; *Tchenguiz v Grant Thornton UK LLP* [2017] EWCA Civ 83. For the determination of actions deriving directly from the insolvency proceedings and closely linked with them, see Case 133/78 *Gourdain v Nadler* [1979] ECR 733.

¹⁸¹The MLJ cannot be applicable either. It contains jurisdiction rules on recognition and enforcement but not commencing proceedings.

¹⁸²EIR 2015, Arts 41 and 56.

¹⁸³*Ibid*, Arts 42 and 57.

¹⁸⁴*Ibid*, Arts 43 and 58.

¹⁸⁵*Ibid*, Arts 44 and 59.

¹⁸⁶*Ibid*, Arts 7–18.

¹⁸⁷*Ibid*, Arts 56–77.

¹⁸⁸TFEU, Art 81 (para 1: 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decision in extrajudicial cases.'). EIR 2015, recital (1) and (3). Virgos-Schmit Repot [7] and [42].

¹⁸⁹Si, Zhang and Liu (n 7); Cheng (n 8).

¹⁹⁰Hong Kong Basic Law, Art 95.

¹⁹¹Si, Zhang and Liu (n 7); Cheng (n 8); Gong (n 8).

¹⁹²TFEU, Art 267.

¹⁹³Hong Kong Basic Law, Art 158.

the foundation for judicial cooperation. In addition, it is highlighted that judges from both sides should strengthen their cooperation in interpreting cross-border insolvency provisions.

Last but not least, it is clarified that this proposal only intends to use the EIR as a reference, but it does not mean that the Mainland–Hong Kong cooperation arrangement should be identical. The EIR *per se* receives criticism and several provisions need reforms or clarifications.¹⁹⁴ It is still up to Mainland and Hong Kong authorities to agree on provisions that best suit the needs of both.

2. Enhanced cooperation

Apart from reforming detailed rules, what is needed is a concrete and actionable cooperation mechanism. Cooperation has been highlighted in the Record of Meeting and stated explicitly in the Opinion. For example, administrators in the two jurisdictions should strengthen their communication and cooperation.¹⁹⁵ Courts in the pilot areas in the Mainland shall actively communicate and take forward cooperation with the courts in HKSAR.¹⁹⁶

However, without further substantiating the statement, the obligation imposed to cooperate is a rather empty one. As reflected in the *PUFG* judgment, Justice Harris hoped to ‘advance the communication and cooperation... of the SPC’s Opinion encourages’.¹⁹⁷ He holds a strong position to strengthen the cooperation between the two jurisdictions, and specifically, he distinguishes two levels of cooperation: mechanism cooperation between Mainland and Hong Kong authorities and senior officials, and judges’ communication and cooperation in specific cases.¹⁹⁸ The first level of cooperation has resulted in the new cooperation arrangement with the manifestations of the three documents: Record of Meeting, SPC’s Opinion and HKSAR’s Practical Guide; by contrast, the level of cooperation between courts and administrators is still low, and especially Mainland judges do not have explicit authorization to directly cooperate with and communicate to Hong Kong judges.¹⁹⁹

To overcome such cooperation obstacles, several other international instruments can be mentioned as a reference. The first one is the EIR, which provides a set of rules of cooperation. In cross-border cases, insolvency practitioners shall: (a) ‘as soon as possible communicate to each other any information which may be relevant to the other proceedings’; (b) ‘explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a restructuring plan’, and (c) ‘coordinate the administration of the realisation or use of the debtor’s assets and affairs’.²⁰⁰ Cooperation and communication between courts shall concern: (a) ‘the appointment of the insolvency practitioners’; (b) ‘information by any means considered appropriate’; (c) ‘the administration and supervision of the debtor’s assets and affairs’;

¹⁹⁴For instance, Art 6, see Zoltan Fabok, ‘Jurisdiction concerning annex actions in the context of the insolvency and Brussels Ibis Regulations’ (2020) 29 *International Insolvency Review* 204.

¹⁹⁵Opinion, Arts 15 and 19.

¹⁹⁶Record of Meeting [1]; Opinion, Art 24.

¹⁹⁷*Peking University Founder Group Company Ltd* (n 122) [68].

¹⁹⁸Jonathan Harris, ‘Framework and Mechanism of Cross-Border Insolvency Cooperation’ (Shenzhen Bankruptcy Court, 14 May 2021) <<https://mp.weixin.qq.com/s/ZhtGCnSbs7HBneiBAN5QKA>> accessed 8 February 2022.

¹⁹⁹*Ibid.*

²⁰⁰EIR 2015, Art 41(2).

(d) 'the conduct of hearings'; and (e) 'the approval of protocols'.²⁰¹ Cooperation and communication are also required between IPs and courts.²⁰² With regard to group insolvencies, cooperation and communication are also listed as the first mechanism for the administration of cross-border cases.²⁰³

As a general principle,

[w]hen cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law.²⁰⁴

References can be made to, for instance, the 2012 American Law Institute ('ALI') and the International Insolvency Institute ('III') *ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines*.²⁰⁵ Subsequently, a set of tailored principles were published in 2015 for the EU States in particular, that is, the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines*, also known as *JudgeCo Principles and Guidelines*.²⁰⁶ In 2017 the Judicial Insolvency Network (JIN) was established and published the *JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* and in 2019 the *Modalities of Court-to-Court Communication*.²⁰⁷

Cooperation in international insolvency cases is not merely some declaratory slogan but with concrete meaning and detailed implementing rules.²⁰⁸ Cooperation can be in various forms, from information sharing to jointly coordinating a case.²⁰⁹ It cannot be denied that judges in the Mainland are with limited powers to directly communicate to foreign judges. However, with the new cooperation arrangement allowing for cooperation and communication, legal barriers have been resolved but more detailed rules should be in place for certain and predictable administration of cross-border insolvency cases between the Mainland and Hong Kong.

V. Concluding remarks

The new cooperation arrangement marks a milestone for Mainland–Hong Kong cross-border insolvency, and it shows the intention of and endeavours made from both

²⁰¹Ibid, Art 42(3).

²⁰²Ibid, Art 44.

²⁰³Ibid, Arts 56–60.

²⁰⁴Ibid, recital (48). See, e.g. Ian Fletcher, 'Editorial Notice: Documentation – Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases; Global Guidelines for Court-to-Court Communications in International Insolvency Cases' (2014) 23 *International Insolvency Review* 221.

²⁰⁵ALI and III, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (2012) <www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf> accessed 8 February 2022. In August 2017, III re-posted the ALI-III Global Principles for Cooperation in International Insolvency Cases 2012 on its website at <www.iiiglobal.org> accessed 8 February 2022.

²⁰⁶Leiden University, 'EU JudgeCo Platform' <www.universiteitleiden.nl/en/research/research-projects/law/eu-judgeco-platform> accessed 8 February 2022. See, Willem Nielen, 'European Communication and Cooperation ("CoCo") Guidelines for Cross-border Insolvency Proceedings' (2007) 4 *European Company Law* 260.

²⁰⁷JIN website <www.jin-global.org> accessed 8 February 2022.

²⁰⁸*In re Maxwell Communication Corporation Plc*, 170 BR 800 (SNDY 1994). See comments, e.g. Jay Westbrook, 'The Lessons of Maxwell Communications' (1996) 64 *Fordham Law Review* 2531.

²⁰⁹See, e.g. Wessels, Markell and Kilborn (n 172); Sheryl Jackson and Rosalind Mason, 'Developments in Court to Court Communications in International Cases' (2014) 37 *University of New South Wales Journal* 507.

sides. However, even though the negotiations between the two jurisdictions took a long time, it seems that the two parties only were able to reach a consensus on certain but not all matters at the moment. This article acknowledges the difficulty of reaching consensus among the two jurisdictions with distinct legal traditions, nevertheless, it is not a sufficient excuse for the failure of reaching more comprehensive agreements. The EU Member States had more complex problems with 27 different legal system when agreeing the EIR texts back then. With the EIR as a successful model, we should have faith that a more detailed Mainland–Hong Kong agreement will be in place. Such reforms can be and should be feasible given the abundant international materials available in the international insolvency field and rich experiences from other jurisdictions.

Acknowledgements

I thank Prof. Ling Zhang, Dr Yuanyuan Huang, Dr Geleite Xu, Ms Zoey Jiao Zhang, Mr Haotian Zhang and anonymous reviewers for their comments on the earlier version of this article. I also thank Prof. Julien Chaisse, Prof. Mindy Chen-Wishart, Prof. Louise Gullifer, Prof. Curtis J Milhaupt, and the editorial staff of the Asia Pacific Law Review. All errors, however, are my own.

Funding

This work is supported by the Beijing Social Science Fund [grant number 21FXB006].

ORCID

Shuai Guo  <http://orcid.org/0000-0003-4529-6389>